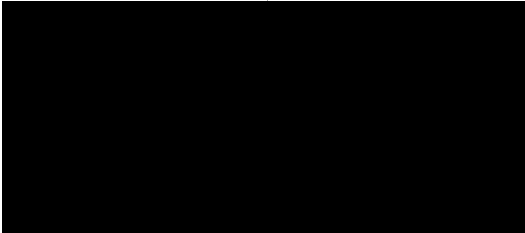


U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

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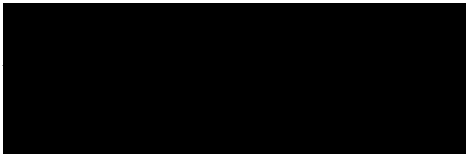
Petitioner:

Beneficiary:



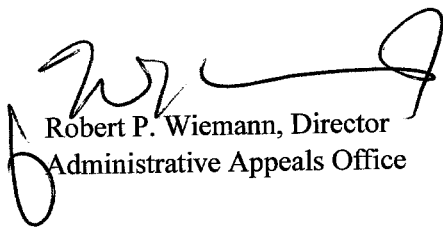
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The Director, California Service Center denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Massachusetts in October 1999 and was authorized to conduct business in California in May 2001. It specializes in software development and software development services. It seeks to employ the beneficiary as its director of United States operations. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the director did not consider all the evidence in the record when making the decision.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four

criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The director recited the petitioner's initial description of the beneficiary's job duties in full. The description will not be restated here. The director determined that the description did not establish that the beneficiary performed primarily executive duties. The director also reviewed the petitioner's organizational chart and the petitioner's California Form DE-6, Employer's Quarterly Tax Return, for the quarter in which the petition was filed. The director determined that the petitioner employed the beneficiary and two H-1B nonimmigrant employees sometime during the second quarter. The director observed that in the month the petition was filed, the petitioner had not paid any salaries. The director further observed that the petitioner had not paid the H-1B nonimmigrant workers their proffered annual salaries in full. The director concluded, based on the petitioner's organizational structure, the beneficiary would be assisting in the petitioner's day-to-day non-supervisory tasks. The director also concluded that the beneficiary would be involved in the performance of routine operational activities rather than the management of a function.

On appeal, counsel for the petitioner notes that the director did not reference the petitioner's job descriptions submitted in response to the director's request for additional evidence. Counsel contends that the director's decision is based only on the initial description as the director failed to factor in the additional details provided in response to the request for evidence. Counsel claims that the director failed to take into account the reasonable needs of the organization in light of its overall purpose and stage of development. Finally, counsel contends that the beneficiary is a manager who "is solely responsible for a function, which centers on the day-to-day operations and marketing efforts of the company."

In response to the director's request for evidence, the petitioner did provide additional details regarding the beneficiary's job duties. The director's decision does not specifically reference the additional details, thus the AAO cannot discern whether the director considered this information. In response to the director's request, the petitioner stated the beneficiary's duties as:

- He will manage the development of aggressive marketing plans and programs for our customized and proprietary CRM [Customer Relationship Management] and Knowledge Management Service (KMS) products, and our web-based Enterpriser Resource Planning (ERP) and Wireless (WAP) development services.
- [The beneficiary] will be responsible for managing all software project timetables, deliverables and resources requirements.
- He will manage a team of two Software Engineers/Programmer Analysts who are responsible for developing the CRM, ERP and WAP solutions. (Please note that as of June 27, 2002, [the beneficiary] only managed one Software Engineer. Since the time of this filing, [the beneficiary] now manages a Programmer Analyst, therefore making the total number of employees managed by [the beneficiary] to two.
- [The beneficiary] will be responsible for overseeing the day-to-day responsibilities of the 2 Software Engineers, as well as all disciplinary actions, performance reviews and salary adjustments.
- [The beneficiary] will work directly with the Sales and Marketing team to develop additional opportunities for organization's software development services.

- [The beneficiary] will develop, implement and manage an aggressive marketing plan, which will specifically outline the target market, the competition, the revenue source, the revenue to be generated, and the expenses to be incurred.
- He will also have the sole responsibility of entering in partnership agreements with both third-party and channel partners to assist in our resourcing and software development requirements.
- He will manage the contract negotiations, as well as the contract relationship.
- [The beneficiary] will study and analyze industry trends and needs for CRM/ERP/KMS and WAP products and services, manage new product introduction rollouts, and exercise sound business judgment and authority in determining whether or not our organization should pursue a certain venture or not.
- He will play a key management advisory role to the President and CEO [chief executive officer] of our organization in determining the revenue potential of any new business opportunities, including potential acquisitions our company will be engaged in, and will provide quarterly reports to the Board of Directors in India.

The petitioner also indicated that the beneficiary would: (1) spend 30 percent of his time overseeing software engineers and project lifecycles, including oversight and review of the functions of the software team, as well as, supervision, development, and execution of onsite and offshore development projects; (2) spend 30 percent of his time making decisions on budget and operational costs, hiring, promotion, and performance evaluations, developing and implementing policies and procedures on target markets, hiring and firing procedures, sales budgets, human resources, and legal affairs; (3) 20 percent of his time on quality management including oversight and management of outsourced projects, setting policies and defining quality requirements on client deliverables; and, (4) 20 percent of his time on new production introduction including promotion and rollout of proprietary technologies, as well as, setting up third party and distribution channels and product follow-up.

Counsel asserts that the petitioner's descriptions of the beneficiary's duties clearly demonstrate that the beneficiary manages and directs a department, subdivision, function or component of the organization. However, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original).

In this matter, the beneficiary as the petitioner's sole full-time employee will necessarily be performing the petitioner's day-to-day operational tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The beneficiary will necessarily develop and implement marketing plans, perform market research, prepare project timetables, and negotiate and

sign agreements. Generally managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. In this matter, the AAO cannot conclude that the beneficiary is relieved of primarily performing the petitioner's day-to-day operational tasks.

Moreover, the petitioner has not established that it employed the software engineer¹ when the petition was filed and has acknowledged that it did not employ the programmer analyst when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the record does not substantiate the beneficiary's management of software engineers and program analysts. Further, the petitioner indicates that the beneficiary will work directly with the sales and marketing team, but the record does not contain evidence of employees providing sales and marketing services. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The AAO must conclude that the beneficiary is the petitioner's primary salesperson and marketer.

The petitioner allocates 30 percent of the beneficiary's time directly to oversight of the software engineer/program analyst and an additional 20 percent on introduction, promotion, and rollout of proprietary technologies. However, the petitioner has not demonstrated that it employs sufficient personnel to relieve the beneficiary from performing these operational tasks. Counsel correctly observes that CIS must consider the reasonable needs of an organization as required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. However, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Finally, the record does not support counsel's contention that the beneficiary is a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Again, if the beneficiary is primarily performing the operational and administrative tasks of the organization, the beneficiary is not

¹ The petitioner provided evidence that it employed the software engineer in the two months prior to filing the petition and in the two months subsequent to filing the petition; but as previously noted the petitioner's California Form DE-6 shows that the petitioner did not employ anyone the month the petition was filed. Further, as the director observed the record does not establish that the software engineer was employed full-time.

considered to be employed in a managerial or executive capacity. See *Matter of Church Scientology International, supra*. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary manages and directs the organization rather than performing the essential operational and administrative tasks. The record demonstrates that the beneficiary primarily performs the specified responsibilities and spends a majority of his time on day-to-day functions.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.